Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-228

DR. ANNIE LAURIE KEYES,
Petitioner,

versus

LENOIR-RHYNE COLLEGE, a nonprofit corporation; WALLACE J. JORGENSON, Chairman of the Board of Trustees of Lenoir-Rhyne College, and DR. RAYMOND M. BOST, President of Lenoir-Rhyne College,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The Opinion of the Court of Appeals, which was delivered on March 31, 1977, is reported as 552 F. 2d 579, and is attached hereto as Appendix "C". Motion for Rehearing, attached hereto as Appendix "D", was filed and, on May 12,

1977, the motion was denied, the Order on Rehearing being attached hereto as Appendix "E". The District Court's Judgment, which is not reported, is attached hereto as Appendix "B".

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the District Court's findings that Petitioner's evidence failed to create a prima facie case of any violation of Title VII and the Equal Pay Act were made with regard to applicable principles of law and were not clearly erroneous.

2. Whether the District Court's alternative findings that defendants had presented clear and convincing evidence to explain any salary disparaties between male and female professors and that such differentials were based upon legitimate, reasonable and nondiscriminatory factors were clearly erroneous.

3. Whether the Court of Appeals applied the correct standard of review to the District Court's findings of fact.

STATEMENT OF THE CASE

The petitioner, Annie Laurie Keyes, was employed by the respondent, Lenoir Rhyne College, for the 1968-69 school year as a Professor of Education. She had previously been employed by the College from 1945 to 1949 as an associate professor but had resigned to accept employment with the United States Department of Health, Education and Welfare. At the time of her reemployment by the College she was sixty eight years of age. In 1969 the Board of Trustees of the College reduced the retirement age of all personnel, including faculty members, from sixty eight to sixty five years of

age, and gave written notice of the change to the faculty and other employees. The contract of employment of Ms. Keyes was renewed each year through the 1972-1973 school year, the year in which she reached age sixty five. She was notified on March 31, 1972, that her employment would be terminated at the conclusion of the succeeding academic year.

After her request to teach beyond retirement age was denied she asked for and was given a full hearing before the Board of Trustees of the College which affirmed the decision of the administration. She filed charges with the United States Department of Labor and with the Equal Employment Opportunity Commission and, after receipt of her ninety-day letter from EEOC, she instituted this action alleging violations of Title VII in hiring, promotion, tenure, salary, dismissal, nonrenewal, and other conditions of employment. She also invoked the First, Fifth and Fourteenth Amendments to the Constitution and used the pendent jurisdiction of the Court to assert a common law contract action. The plaintiff alleged a class action and prayed for a declaratory judgment and class and individual injunctive relief including plaintiff's reinstatement and back pay.

The defendants timely answered generally denying plaintiff's allegations and challenging the propriety of a class action. The defendants moved that the action be dismissed with respect to defendants Jorgenson and Bost. On October 3, 1974, the District Court denied the motions to dismiss and conditionally certified a class consisting of "(t)hose females previously and presently employed as faculty members at Lenoir-Rhyne College." The District Court further ordered on June 2, 1975, that the action be tried by a jury on the pendent state contract claim and by an advisory jury on the Title VII claim. Prior to trial, the plaintiff moved to amend her complaint to allege that the defendants' prac-

tices violated the Equal Pay Act of 1963, § 206 et seq., and to pray for an award of attorney fees. These motions were allowed.

The case was tried on October 21-25, and 28, 1975. At the close of the arguments, the Court dismissed the individual defendants and submitted to the jury the contract issue. The Court further asked the jury to advise whether the defendants had unlawfully discriminated against plaintiff or the class and whether the defendants had denied equal pay to the plaintiff or to the class. The jury answered the pendent contract issue against the plaintiff. It issued an advisory opinion that the plaintiff individually had not been discriminated against or denied equal pay but that the class had been discriminated against and denied equal pay.

The plaintiff moved to set aside the jury verdict on the contract issued on November 19, 1975, and submitted proposed findings of fact and conclusions of law on the discrimination issues. The defendants thereafter submitted counter proposals.

The Court issued its Memorandum of Decision and Judgment on January 2, 1976.

The Court found that the plaintiff's evidence failed to disclose any pattern or practice or specific instance of overt discrimination based on sex and that the plaintiff had failed to establish a prima facie case by her statistical evidence and concluded that, in any event, the College had presented clear and convincing evidence to explain any apparent disparity in salary between males and females by demonstrating that all such differentials were based on legitimate, reasonable and nondiscriminatory factors. On the breach of contract issue the Court denied the plaintiff's motion to set aside the jury verdict. Accordingly, the Court issued a judgment for

the defendants on all issues and dismissed the complaint.

The Court of Appeals, on March 31, 1977, after finding and concluding that although the evidence revealed the average male faculty salary was higher than that of females there was no showing of any salary differential for teaching positions which were substantially equal and that no evidence was offered comparing salaries discipline by discipline or department by department, affirmed the District Court's finding that the plaintiff had failed to establish a prima facie case. The Court of Appeals further concluded that the District Court's alternative findings that the College had presented clear and convincing evidence to explain any disparity in salary between males and females by demonstrating that such differentials were based upon legitimate, reasonable and nondiscriminatory factors were not clearly erroneous, and further held that the District Court had not abused its discretion in denying the plaintiff access to the confidential faculty evaluations records of the College since the College had not attempted to justify any male-female salary disparity on the basis of these evaluations.

Judge Craven, dissenting, concluded that Plaintiff's Exhibit 13a established a prima facie case of salary discrimination based on sex which was not rebutted by the College.

The Plaintiff filed a petition for Rehearing In Banc on April 13, 1977. This petition was denied on May 12, 1977.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The District Court's Findings Of Fact And Conclusions Of Law That Plaintiff's Evidence Failed To Create A Prima Facie Case Of Any Violation Of Title VII And The

Equal Pay Act Were Made With Regard To The Applicable Principles Of Law And Were Not Clearly Erroneous.

Plaintiff in this Court argues that the Courts below created a higher and undefined standard of proof because this is a college faculty case. The Respondents submit that such is not the case. The record, if examined and reviewed in its entirety, leads to the only possible conclusion that the Courts below correctly applied the required standard of proof in this case as is called for in *McDonnell Douglas Corp. vs. Green,* 411 U.S. 792 (1973), *Corning Glass Works vs. Brennan,* 417 U.S. 188 (1974).

The Trial Court, after hearing and reviewing a record consisting of more than one thousand three hundred (1,300) pages including eight hundred seventy five (875) pages of sworn testimony and thirty six (36) exhibits introduced by the parties, correctly and pointedly applied the following principles of law laid down in the above cited cases and as stated in the Memorandum of Opinion and Judgment:

> "The Plaintiff has the initial burden of proving disparity in salaries with respect to faculty members who held jobs, the performance of which required equal skill, effort amd responsibility and which were performed under similar working conditions. Only after Plaintiff's facts established a prima facie claim would the burden shift to the College to demonstrate that the discriminatory differential, if established, was based on factors other than sex."

The District Court correctly observed and concluded as a matter of fact and law that the Plaintiff's only evidence on the issue consisted entirely of charts prepared from salary information furnished by the College and that no showing was attempted by the Plaintiff, from charts or otherwise, to

demonstrate that the work performed by males and females was equal or that the jobs were substantially equal or the same. No attempt was made to compare salaries discipline by discipline or department by department. The Court of Appeals made the same findings and reached the same conclusions in its examination of the record, observing "(W)hile the evidence revealed that the average male faculty salary was higher than that of females, *there was no showing* of any salary differential for teaching positions which were substantially equal, and in presenting her statistical evidence, the Plaintiff made no comparison of salaries discipline by discipline or department by department".

With all due respect to the Dissent below, it appears that the Dissent was content to rely solely on Plaintiff's Exhibit 13a in making salary comparisons between male and female faculty members in three (3) departments to create a prima facie case of salary discrimation based on sex. Respondents respectfully argue and submit that Plaintiff's Exhibit 13a shows only rank, tenure and salary of the various department members without any showing of years of experience, degrees held, disciplines taught, skills, responsibilities, similarities of working conditions or other legitimate factors. It is argued that this exhibit, standing alone, is not and could not be the statistical evidence contemplated by the Court in *McDonald Douglas Corp. vs. Green,* supra. This Exhibit is void of evidence showing disparity between individuals possessing the same or substantially the same skills, performing the same or substantially the same work.

It is respectfully submitted that the Petitioner, as to this question, has wholly failed to sustain her burden under Rule 19 that there are special and important reasons why the Writ should issue or that an important question of Federal Law is included which has not been decided but which should

be decided and settled by this Court. The opinion below is consistent with other circuit cases under Title VII involving academia. See *Faro vs. New York University*, 502 F.2d 1229 (1974); *Green vs. Board of Regents of Texas Tech University*, 474 F.2d 594 (1973).

II. Whether The District Court's Alternative Findings That Defendants Had Presented Clear And Convincing Evidence To Explain Any Salary Disparities Between Male And Female Professors And That Such Differentials Were Based Upon Legitimate, Reasonable And Nondiscriminatory Factors Were Clearly Erroneous.

A. Respondents further argue that from an examination of the whole record, it is clear that the Trial Court and the Court of Appeals correctly concluded that if Petitioner's evidence was sufficient to establish a prima facie claim, the Respondents had explained any apparent disparity in salary between males and females and had demonstrated by the evidence that such differentials were based upon legitimate, reasonable and nondiscriminatory factors. To say that there was no explanation of apparent disparities in salaries is ignoring the record which reveals long and detailed testimony of the Dean of the College explaining with particularity each instance of apparent disparity and the reasons for the male salary being higher than female and the reasons for the female salary being higher than the male. In each case, whether the male salary was higher or the female salary was higher, his explanations showed the differential was based on legitimate, reasonable and non-discriminatory factors, and the District Court so found. In the instances of apparent disparity citied in the Dissent below, the record reveals that Dr. Weiner (Assistant No. 1) held a Ph.D., had eight (8) years of prior teaching experience, had experience in an administrative post in public education in New Jersey, that the need of the College at the time he was hired was unusual, and special circumstances surrounded his recruitment to the faculty (See Appendix F.); in the case of Dr. Swarzbek, it was shown he taught a more difficult field, namely, psychology, and had been employed one (1) year prior to Ms. Keyes (See Appendix F); in the case of Professor Smith, it is shown that he had completed all his work toward a Ph. D. except his dissertation (See Appendix F); in the case of Professor Whiteside, the record reveals he was not in the employment of the College in 1972-73, the year Title VII was made applicable to Colleges; in the case of Professor Jeffers, the record shows she was transferred to Theater Arts and herself testified that she had not been discriminated against; that all female faculty members from the departments compared by the Dissent all testified that they had not been discriminated against by the College (See Appendix F for a portion of the record's explanation of the individuals involved.)

As to this question, Petitioner raises no important and unanswered question of Federal Law but challenges facts that cannot be reasonably held to be clearly erroneous.

B. The Trial Court Properly Allowed The Respondents To Preserve The Confidentiality Of Its Faculty Evaluation Records Where Those Evaluations Were Not Used To Justify Any Male-Female Disparity.

Respondents respectfully submit that when the testimony of Dr. Bost, relied upon by Petitioner in her argument, is read in context, it will be found that the College did not resort to the evaluations referred to to justify any male-female disparity. Read in context, Dr. Bost's use of the word "rated" in reference to Associate Professor No. 2 was not in reference to a confidential evaluation but was his phraseol-

ogy in describing the general reputation of this professor on campus among students, faculty and administration. This professor had been voted the Distinguished Professor Award (See Appendix F for a further explanation of this professor's salary).

The District Court's Finding of Fact No. 18, when read in context, also reveals only an explanation of the factors used to determine salary and is no way a justification of any male-female disparity.

The Respondents respectfully argue that the District Court's findings that the College did not resort to confidential evaluations to justify any male-female disparity is supported by the record. On review, the Court of Appeals found and held that the College did not resort to the evaluations for these purposes and in the absence of further showing on the part of the Plaintiff, the District Court's decision to protect the records from disclosure was not an abuse of discretion.

Respondents submit that as to this issue, Petitioner has not come forward with any further showing of any important and special reasons why the Writ should issue. Petitioner fails to show an important question of Federal Law which has not been decided but which should be decided and settled by this Court. As to this issue, Petitioner challenges only a finding of fact that cannot be reasonably called clearly erroneous.

III. Whether The Court Of Appeals Applied The Correct Standard Of Review To The District Court's Findings Of Fact.

"Discerning no error of fact or law" the Court below affirmed the Judgment of the District Court.

Although the standard of review was not raised by the Petitioner nor specifically discussed by the Court below, the Petitioner, citing *Causey vs. Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975), now seeks to have this case reviewed on the grounds that the "clearly erroneous standard of review" was applied to the ultimate fact in this case, to wit, the proof of discrimination; and asserts that there exists a conflict between the Fifth Circuit and the Fourth Circuit in the application of the standard of review.

The standard of review on appeal is found *Rule 52a, Federal Rules of Civil Procedure.* The Fourth Circuit Court of Appeals' application of this rule is found in *Jones vs. Pitt County Board of Education,* 528 F.2d 414, 418, (1975). Quoting from *Zenith Corporation vs. Hazeltine,* 395 U.S. 100, (1969), the Court said "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." The Court further said "We recognize that we are not bound by the factual determinations of the district court merely because they are supported by substantial evidence, and that a finding may be rejected as "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed (citing *United States vs. U.S. Gypsum Co.,* 333 U.S. 364, 365, (1948). This does not mean, however, that we may substitute our judgment for that of the district court."

Respondents respectfully submit that the aforementioned

standard of review is the correct standard of review, and, although the Court below was not asked to and did not delineate the rule in this case, there is no departure by the Court in this case of the proper application of the rule.

Further, Respondents argue that there is no substantive conflict between the Fifth Circuit Court of Appeals and the Fourth Circuit of Appeals in the application of the rule, and no perceptive difference between the Court of Appeals' review in the case at bar of the use of statistics and the Fifth Circuit's review of statistics in *Causey vs. Ford Motor Co.*, supra, at Page 424, and *Wade vs. Mississippi Co-Operative Extension Service,* 528 F.2d 508, 517, (1976). Nor can the Respondents perceive any substantial difference between the Fourth Circuit's review of the College's justification of salary differences in this case and the Fifth Circuit's review of similar justification in *Wade vs. Mississippi Co-Operative Extension Service,* supra, at page 518.

It is respectfully submitted that the opinion below did not apply an inappropriate standard of review nor a standard of review inconsistent with the Fifth Circuit.

CONCLUSION

For the reasons stated above it is respectfully submitted that the Petitioner has failed to sustain her burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The Court of Appeals correctly held the Findings of Fact and Conclusions of Law of the trial court were not clearly erroneous.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Brief For Respondents In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit, have been served this the 7 day of September, 1977, by the United States first class mail, upon the following:

J. Levonne Chambers

John W. Gresham

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W. Gene Sigmon

W. GENE SIGMON

APPENDIX A

IN THE

Supreme Court of the United States

FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

DR. ANNIE LAURIE KEYES,

Plaintiff.

vs.

LENOIR RHYNE COLLEGE, ET AL.,
Defendants.

Civil Action
No. ST-C-74-10

MEMORANDUM OF DECISION

The Plaintiff, Dr. Annie Laurie Keyes, instituted this action against the Defendants, Lenoir Rhyne College, its President, Dr. Raymond M. Bost, and the Chairman of its Board of Trustees, Wallace J. Jorgenson, seeking injunctive, declaratory and monetary relief for herself and other female faculty members of the College for alleged discrimination in employment opportunities because of their sex and age. The action was brought under the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. 2000e, et seq., the Fourteenth Amendment of the Constitution, and 28 U.S.C.A. 2201 and 2202.

In Count Two of the Complaint the Plaintiff, alleging pendant jurisdiction, seeks damages for breach of contract

under the common law of North Carolina. She contends that she and the Defendants entered into a contract at the time of her initial employment under which she was promised continuous employment until age 68 if her work was satisfactory, and that the Defendants breached the contract by requiring her to retire at age 65.

The Defendants answered denying any discrimination againt female faculty members or any breach of the Plaintiff's employment contract. They demanded a jury trial on all issues of fact in both alleged causes of action, and the Plaintiff moved to strike such demand. The Court denied the Plaintiff's Motion as to the contract action contained in Count Two of the Complaint, and ordered the causes tried together with the jury acting in an advisory capacity as to the discrimination issue.

The Court certified the action as a class action consisting of all past, present and future female faculty members who have been, who are presently, and who in the future may be adversely affected by any discriminatory employment practices based on sex by the Defendants.

Just prior to trial the Plaintiff moved to amend her Complaint to set forth a claim of denial of equal pay because of her sex under the Equal Pay Act of 1963, 29 U.S.C.A. 206(d), and for counsel fees. The Court, in its discretion, allowed the Motions.

The matter was tried by the Court and a jury at the October 1975 Term in Statesville and the Court submitted to the jury issues of employment discrimination based on sex as to the Plaintiff and her class, denial of equal pay based on sex, and breach of contract. The jury answered the issues of breach of contract, denial of equal pay and employment discrimination as to the Plaintiff against her, but found that

the Defendant College discriminated against female faculty members because of sex in salaries and benefits and had denied them equal pay.

The Plaintiff moved to set aside the jury verdict on the contract issues and to grant her a new trial on the grounds that the Court erred in failing to admit parol evidence relative to the contract of employment, and the Defendants urge the Court to disregard the jury findings on the class discrimination issues.

The Court has reviewed the evidence, briefs, arguments of counsel and the jury verdict, and now enters its findings and conclusions.

1. The Plaintiff, Dr. Annie Laurie Keyes, is a female citizen of the United States and resides in Catawba County, North Carolina. She was employed by the Defendant Lenoir Rhyne College for the 1968-69 school year as a Professor of Education. Her contract of employment was renewed each year until the end of the 1972-73 school year when she was required to retire at the age of 65. After her forced retirement she obtained employment with the public school system of Catawba County at an equal or greater rate of pay and was still so employed at the time of trial.

2. The Defendant Lenoir Rhyne College is a private institution, chartered by the State of North Carolina as a nonprofit corporation to provide post secondary, liberal arts and professional education, and is located in Hickory, North Carolina. It is a co-educational liberal arts college owned and operated by the North Carolina Synod of the Lutheran Church in America to provide education to young people embodying Christian principles. It was founded in 1891 by a group of Lutherans with its primary purpose to train the clergy and school teachers. It operates with a relatively

small administrative staff and faculty, the total faculty numbering about 90 people, and an average student enrollment of 1300. The College is governed by a Board of Trustees selected by the Lutheran Church and such Board determines the policy of the College as to employment, retirement, compensation, and duties of faculty members.

3. The Defendants, Dr. Raymond Bost and Wallace J. Jorgenson, are the President and Chairman of the Board of Trustees, respectively, and under the by-laws and constitution of the College are authorized and empowered to recommend appointment and approval of faculty and staff employees and to administer employment policies and practices set by the Board.

The President is the Chief Administrative Officer of the College and is charged with the duty to make final executive decisions on matters of administration and to appoint key administrative personnel, subject to the approval of the Board of Trustees. He is charged with the responsibility of making faculty appointments, recommended by the Academic Dean and the Chairman of the Division and Department involved, subject to the approval of the Board of Trustees. The President recommends to the Board the compensation and promotions of faculty members and the appointment of Department and Division Chairmen.

4. The Academic Dean of the College is entrusted with the oversight of the instructional program and with the promotion of academic excellence, and in this responsibility he is to conduct faculty procurement and to recommend to the President appointments, retention, promotion and dismissal of instructional personnel to maintain a competent teaching staff, utilizing the counsel of Divisional and Departmental Chairmen. For the extra duties Division Chairmen are paid

an additional salary of $100 per month or $900 per school term.

5. The College has four academic divisions which are headed by Chairmen or Chairpersons who annually submit reports to the Academic Dean and also assess, in consultation with the Department Chairmen, the needs of the Division regarding instructional staff and to cooperate with the Dean in selecting instructors for the academic program. These Chairmen evaluate annually the work of all staff members serving in the Divisions and forward the information to the Academic Dean including recommendations for faculty advancement, retention, or termination. The Divisions are divided into 14 Departments of Instruction, each headed by a Chairman. It is the duty of the Chairman to oversee instruction in the Department and to evaluate annually the work of all staff members serving within such Department, and to make, to the Chairman of the Division, recommendations for the advancement, retention or release of the staff. Because of the extra duties, Department Chairmen are paid an additional salary of $50 per month or $450 per school term.

6. The College has four ranks of faculty members as follows: Professor, Associate Professor, Assistant Professor and Instructor. Salary ranges for each of these four ranks are adopted annually by the Board of Trustees without regard to sex. In 1969-70, the College adopted a promotion policy requiring a doctorate for full professorship. Prior to that time, a Ph.D., or its equivalent was not mandatory for promotion to the rank of full professor and those people who had been promoted prior to the adoption of the 1969-70 policy were not affected and retained their rank. The College grants tenure of position as recognition of competent and continuous service as a member of the teaching staff. Tenure is obtained by

a full professor on appointment to a fourth year of service on the faculty after having completed three academic years of full service at any rank. Associate and Assistant Professors obtain tenure upon renewal of appointment after having completed six years of full time service on the faculty at any rank. Tenure does not extend to the rank of Instructor. Termination of limited, continuous or tenured appointment is warranted for the following reasons: incompetence, gross neglect of duty, immorality, demonstrable financial exigencies upon the part of the College or the elimination or reduction of a Department. In addition, tenure may be granted to a faculty member with initial employment.

7. The Board of Trustees determines the policy of the College relative to retirement of all personnel, including faculty members. In March of 1969 the Board reduced the retirement age from 68 to 65 and gave written notice of such change to all faculty members and employees. The 1969-70 Faculty Handbook, and for each school year since, contained the following statement as to retirement:

> "All College employees will retire at the end of the academic year in which they attain the age of 65. The academic year ends with the annual summer school graduation exercises. As in the past, extensions of service beyond the stated retirement age may be made for definite periods not to exceed one (1) year each as approved by a special vote of the Board of Trustees."

8. Both before and after the change in the retirement age the College considered the following factors in determining whether to grant annual appointments to faculty members beyond retirement age: (1) the desire of the faculty member to continue teaching; (2) the continued effectiveness of the teacher; (3) the availability of replacement; and (4) the needs

of the College for the continued service of the faculty member in question.

9. By letter dated October 31, 1967 the College, through its then President, Dr. Voight Cromer, offered the Plaintiff a one (1) year faculty appointment for the academic year of 1968-69. The letter stated, in part, as follows:

> "Upon the authorization of the Board of Trustees, given at its recent meeting on October 27, it pleases me to extend to you an official appointment to a position on the faculty of Lenoir Rhyne College as Professor in the Department of Education, effective September 1, 1968. While the initial appointment is for one (1) academic year, it is made with the expectation of renewal on the assumption that the relationship will be mutually satisfactory."

The Plaintiff accepted the appointment and entered upon her duties September 1, 1968. On March 17, 1969 she was extended an appointment for the 1969-70 academic year which she accepted. Then on March 20, 1970 she was offered and accepted an appointment, with tenure, for the 1970-71 academic year as Professor of Education. The same procedure was followed in 1971 for the 1971-72 school year but in 1972 she was advised that the appointment for the academic year 1972-73 would be the last one since she had reached the retirement age of 65.

10. The Plaintiff requested that she be allowed to teach beyond her retirement age but the request was denied by the administration of the College. She appealed the decision to the Board of Trustees and a full hearing was held on July 18, 1973 before the Committee on Instruction of the Board. The Committee and the Board denied her request and she was forced to retire.

11. The Plaintiff thereafter filed charges with the United States Department of Labor alleging that female faculty members at the College were being denied equal pay. An investigation was made but the evidence does not disclose the findings, but no action was taken by the Labor Department. The Plaintiff then filed charges of sex discrimination against the College with the Equal Employment Opportunity Commission. On January 11, 1974, the Plaintiff was notified that the Commission had not filed a civil action with respect to her charge and had not entered into a conciliation agreement with the College and that she had a right to institute an action herself within 90 days of the receipt of the notice. The Plaintiff thereupon brought this action.

12. The Plaintiff offered no credible evidence that her sex played any part in the Board's decision not to extend her appointment for another yr after she reached age 65. The evidence clearly established that both men and women had been permitted to teach beyond retirement, and that both men and women had been denied such permission. For example, since 1966 three female teachers were extended and allowed to teach beyond retirement while only one was denied such privilege — that one was the Plaintiff, Dr. Keyes. During the same time eight male teachers were granted such permission and three were denied. The evidence shows that the Plaintiff was not recommended for the extension of her appointment by her departmental and divisional chairmen, and that serious questions existed concerning her continued effectiveness as a teacher. There was evidence of a serious health problem during her last year of teaching, and evidence that she experienced difficulty in performing committee assignments. Her method of student teaching was criticized by her Department head and numerous complaints as to her teaching came from her students. The Court finds that the Board's decision not to renew the Plaintiff's ap-

pointment beyond retirement age was based upon the foregoing factors and considerations and not upon her sex.

13. The Plaintiff testified in her own behalf and called several other female faculty members of the College as witnesses at the trial. None of these witnesses related any specific instances of overt discrimination by the College. Thus she relies entirely upon statistical data to prove her case and now contends that she has established a prima facie case of discrimination against the Defendants. During extensive discovery the College furnished the Plaintiff detailed records as to faculty members from 1966-67 through 1973-74. The Plaintiff offered a female law student as an expert witness who had compiled from these records various charts which, in her opinion, showed that women faculty members at Lenoir Rhyne College, notwithstanding their degrees and experience, have received less pay than comparably situated men. She also testified that these charts show that in comparing individual male and female faculty members, male members were promoted more readily. These charts were admitted into evidence and have been examined closely by the Court.

14. The Defendants contend that the Plaintiff's showing is not sufficient to establish a prima facie case of discrimination as to sex but, nevertheless, proceeded to offer evidence tending to show that no pattern, practice or policy of sex discrimination existed at the College. Officials of the College and Members of the Board of Trustees testified that no policy of sex discrimination exists and to their knowledge none had ever existed. This testimony was supported by several female faculty members who stated that they knew of no instance of discrimination and that they felt they were not discriminated against because of their sex. The College then offered evidence which shows that each discrepancy between

the pay and promotion of male and female faculty members was based upon legal and logical reasons and not upon sex. The following findings are gleaned from the evidence offered by the College.

15. The following chart was offered by the Defendants to show the ratio of male and female faculty members employed by Lenoir Rhyne College from 1966-67 through 1973-74:

CHART

Academic Year	No. Employed	Percentage of Total Employed
1966-67	52 Male	67%
	25 Female	33%
1967-68	52 Male	66%
	27 Female	34%
1968-69	61 Male	70%
	27 Female	30%
1969-70	63 Male	66%
	32 Female	34%
1970-71	62 Male	67%
	30 Female	33%
1971-72	66 Male	70%
	27 Female	30%
1972-73	62 Male	67%
	30 Female	33%
1973-74	67 Male	72%
	26 Female	28%

16. The following chart offered by the Defendants and taken from EEOC Decisions, No. 74-93, March 7, 1973, Section 6426, Page 4137, shows the ratio of females and males on the teaching faculty of Colleges and Universities in the United States in the years 1968-69 and 1972-73:

PERCENTAGE OF FEMALES TEACHING, NATIONALLY

Year	Universities	Colleges & Universities
1968-69	14.8%	19.1%
1972-73	16.5%	20.0%

The information contained in these charts shows that Lenoir Rhyne College has a higher percentage of female faculty members than the national average.

17. The responsibility for the recruitment of faculty members for Lenoir Rhyne College rests with the Academic Dean. The evidence shows that the Dean lists the vacancies with the Cooperative College Registry, a national service out of Washington, D.C., which serves both men and women applicants. Vacancies are also listed with the various graduate schools for both men and women. In addition, unsolicited applications are received from both men and women interested in teaching at the College. The Dean and the Department Head screen the applications and reduce them to two (2) candidates who are invited to the campus for interviews. The interviews are with the Dean, the Division and Department Chairmen and the President of the College. The President and the Dean, through negotiations with the interested applicant, determine the initial salary, within the range set by the Board of Trustees. The factors used to

determine the initial salary are as follows: (1) highest degree; (2) nature of prior experience; (3) length of experience; (4) area of specialization; (5) institution attended, and (6) the condition of the market, such as the number of qualified persons available in the field. For example, about five (5) years ago a person with a Ph.D. degree in Physics could command a high salary level, but, with the current state of the economy and with the present supply of persons with such degree, institutions can obtain such services at a lower salary level.

18. After the initial salary is determined, the annual increases in salary are based upon availability of financial resources and the teacher evaluation criteria. In the 1970-71 school year, a written annual teacher evaluation procedure was established. This procedure requires the Division and Department Chairmen to evaluate each faculty member according to his or her teaching effectiveness, continuing scholarly development, service to the College, church and community, and the ability to work with the faculty, administration and staff. The College also uses these factors and evaluations in determining renewal of contracts, tenure, renewal or non-renewal of contracts of teachers after reaching retirement age, and also to stimulate and encourage faculty members to strive for higher levels of scholarship and teaching efficiency.

19. In 1969, the College adopted and has since followed, a requirement that a teacher must hold a doctorate degree before attaining the rank of full Professor or Associate Professor. Before the adoption of this policy several members of the faculty had been elevated to the position of Professor or Associate Professor who did not hold doctorate degrees. Upon adoption of the policy the rank of these teachers was not reduced and they have remained in such rank. The

attainment of these higher ranks by the several individuals resulted from their long, continuous and superior service to the College. Three (3) individuals with master degrees were full Professors in 1972-73 and they continued in that rank. These three persons had held the rank of full Professor for long periods of time, one for 13 years, one for 25 years and the other one for 37 years. All had at least 25 years of teaching experience and had been with the College for more than 25 years. One was with the Business Department, another in the Math Department (both areas in which doctorate degrees were scarce at the time). The third had been with the Music Department for more than 36 years.

There were seven individuals with master degrees who held the rank of Associate Professor in the year 1972-73. Six of these were males and one was a female. The female was in the Music Department and had been with the College for 26 years and had held the rank for 9 years. One male was an Associate Professor of Economics and Chairman of the Division of Social and Behavioral Sciences with a master's degree from Bucknell University and additional graduate study at the University of Chicago. He had been with the College for 25 years and had been Associate Professor for 14 years. Another male had 20 years teaching experience, 16 years with Lenoir Rhyne College, and had been an Associate Professor for 10 years in the Business Department and held two graduate degrees. Another male had 22 years teaching experience, 18 with this College, had been an Associate Professor for 10 years, and was Director of Athletics and head football coach. Another male had 33 years teaching experience, 12 with this College, and had been Associate Professor of Biology for 8 years. He had a master's degree from Wittenburg University and did additional graduate study at Ohio State and the University of Tennessee. Another male was an Associate Professor of English with a

master's degree from the University of North Carolina at Chapel Hill, with additional graduate study at the University of Southern California. He had 25 years teaching experience with Lenoir Rhyne College and had been an Associate Professor for 9 years. The last male had a master's degree from the University of Leipzig and had completed additional graduate studies at the University of Jena.

20. In 1972-73, six males with doctorate degrees held the rank of Assistant Professor and three females with such degrees held the same rank. There were 20 males with master's degrees teaching as Assistant Professors and 13 females with such degrees and rank.

21. The following chart offered by the Defendants indicates the ratio of master and doctorate degrees awarded to men and women in all fields in the United States for the years shown. (From EEOC Decisions, No. 74-93, March 7, 1973, Section 6426, Page 4137).

DEGREES AWARDED, ALL FIELDS, UNITED STATES

Degree	Years	Total	Male	Female	Percentage Female
M.A.	1970-71	230,509	138,146	92,363	40.6
Ph.D.	1970-71	32,107	27,530	4,577	14.7
Ph.D.	1960-69	154,111	136,182	17,929	11.6

The following chart shows the women in the work force, including teachers in colleges and Universities:

WOMEN IN THE WORK FORCE

Source: Occupational Outlook Handbook, 1974-75 Edition, U.S. Department of Labor 1974

1. *College and University Teachers* (Page 208)

"In 1972, about 620,000 teachers worked in more than 2,600 colleges and universities."

"In 1972, about one-fourth (¼) of all college and university teachers were women."

2. *Scientific and Technical Occupations*

Occupations	*% Women*
Biologist	33% (Page 367)
Mathematician	15% (Page 372)
Chemist	10% (Page 380)
Physicist	4% (Page 384)

3. *Health Occupations*

Registered Nurses	99% (Page 502)

4. *Social Scientists*

Economists	6% (Page 532)
Geographers	15% (Page 536)
Historians	10% (Page 534)
Political Scientists	10% (Page 538)
Sociologists	14% (Page 540)
Psychologists	25% (Page 564)

22. The four academic divisions were formed in 1969-70 and since that time two female professors have chaired two of such divisions. Dr. Laura Clayton, a female Professor with a Ph.D. degree, served as Divisional Chairman of the Humanities Division in 1972-73 and Dr. Carolyn Huff, a

female Professor with a Ph.D. degree, served as Chairman of the Social and Behavioral Sciences Division in 1974-75. In the academic year 1972-73, the Nursing Department, the History Department and the English Department were chaired by women professors. Dr. Farthing, a female with a doctorate degree in Nursing, has headed the Nursing Department for many years. Women teachers have served as Chairman of numerous committees during the years covered by the evidence.

23. The following chart depicts the relative rank of the highest salaried female faculty members of the College from 1967-68 through 1973-74:

Academic Year	Rank of Highest Female
1967-68	2nd and 4th
1968-69	2nd
1969-70	1st
1970-71	7th
1971-72	7th
1972-73	14th
1973-74	4th

The highest paid faculty member during the year 1969-70 was a female and she was the second highest paid faculty member during the academic year 1968-69. She was a graduate of the College, New York Theological Seminary, and held a Ph.D. degree from New York University. She had 22 years experience in teaching and her field (Sociology) was one in which few doctorate degrees were available at the time. Her salary and rank were determined by her degrees, her experience, her area of specialty and the market demand. Her sex played no part in her pay or rank.

24. In answer to the discrepancies in pay of female faculty members shown by the charts prepared and explained by the Plaintiff's expert witness, the Defendants offered the Academic Dean of the College as a witness. His testimony was long and involved and dealt with each faculty member's pay shown in the charts. He outlined the degrees of each teacher, institution attended, teaching experience or the lack of it, the availability of the skill in the market place at the time of employment, area of specialization, and the need for such skill in the College program. In each instance of apparent salary disparity between male and female faculty member similarly situated, a careful examination of the evidence offered by the College reveals a valid, consistent, non-discriminatory reason for the salary levels. The following examples for the year 1972-73 will serve to make the point:

The highest paid Professor at the College during this year was a male with a Ph.D. degree in Chemistry from Ohio State University. He attended Tokyo Institute of Technology and has a post-doctoral at the University of Kansas and additional graduate study at the University of Tokyo, the University of North Carolina at Chapel Hill and the University of Tennessee. He had 17 years experience of teaching, 15 of them at Lenoir Rhyne and has held the rank of full Professor for 10 years. He chairs the Department of Chemistry. His salary was dictated by the area of his specialization (Chemistry), years of experience, institutions attended and degrees obtained and areas of responsibility in his field. There are no comparable females in the Chemistry Department and nationally the percentage of women in the workforce (teachers and non-teachers) in Chemistry is only 10 per cent. The evidence is clear that this salary and rank are unrelated to sex.

The second highest salary for a faculty member of the College for 1972-73 was also a male with a Ph.D. degree in Physics, with ten years of experience, 8 of which were at Lenoir Rhyne. He attended the College and the University of North Carolina where he obtained his doctorate degree. His salary was determined by his area of specialization (Physics), years of experience and the institutions attended and degrees obtained, and the competition in the market place for his skill at the time of his initial hiring. There are no females in the Department and none are available. During 1974 only 4% of the nation's Physicists (teachers and non-teachers) were women. He is head of his Department and his salary and rank were based on factors not related to sex.

The third highest paid faculty member in 1972-73 was a male with a Ph.D. in Mathematics with ten years teaching experience. He attended Lenoir Rhyne College, California Institute of Technology, and holds a Ph.D. degree from Duke University. He taught at Duke and at Georgia Tech and was hired from Georgia Tech by Radio Corporation of America as a computer expert for the United States Space Exploration effort. At the time he was hired there were no professors in the Math Department who possessed doctorate degrees and it was necessary for the College to pay a higher salary in order to obtain him. The highest ranking member of the Department at that time was a male with 27 years experience and head of the Department. This new comer received a starting salary higher than the Chairman of the Department. There was no comparable female faculty member in the Math Department and nationally only 15% of Mathematicians (teachers and non-teachers) were female and only 15% of the Ph.D. degrees awarded in 1970-71 in the nation were women. His salary was determined by the area

of specialization, the market demand for his skills and the needs of the College for a Ph.D. for the Math Department. There was no sex discrimination in his selection or in the fixing of his salary.

25. The Defendants offered evidence comparing the salary of a female professor with that of several male professors similarly situated to show that many factors must be considered in setting salaries for college professors. Dr. Laura Clayton, a female professor with a Ph.D. degree from the University of North Carolina at Chapel Hill, and who had additional graduate study at the American Academy in Rome, the University of Copenhagen in Denmark, the Virgilian School in Naples and Humay University of the West Indies, and with 14 years teaching experience, 9 years with the College, earned a higher salary with the College than a similarly situated male in the Religion Department with a Ph.D. degree from Duke University and with 21 years teaching experience. She earned a higher salary than the following *male* faculty members: (a) A Professor in the History Department who had a Ph.D. degree from the University of South Carolina, with 13 years of teaching experience; (b) A Professor in the Music Department with a master's degree in Music from American Conservatory of Music and with 37 years of teaching experience at Lenoir Rhyne, and 37 years as a full professor; (c) A Professor in the Math Department with 26 years teaching experience at Lenoir Rhyne and 13 years as a full professor with a master's degree from Western Reserve University, additional graduate study at the University of Maryland and all but a dissertation on a doctorate at Western Reserve University; (d) An Associate Professor of Biology with a master's degree from Purdue University, and a Ph.D. degree from the University of Michigan and 9 years teaching experience; (e) An Associate Professor in Sociology

with a Ph.D. degree from the University of Nebraska with 24 years teaching experience; (f) An Associate Professor of Music with a M.M.E. degree from Northwestern University and an E.D.D. degree from Florida State University with 11 years teaching experience, three of which were at Lenoir Rhyne; (g) An Associate Professor of Chemistry with a Ph.D. degree from the University of North Carolina, post doctoral appointments at William and Mary College and the University of Bordeaux (France), with 6 years teaching experience, four at the College; (h) An Associate Professor of Biology with a Ph.D. degree from the University of Arizona, with 6½ years teaching experience, 3½ with the College; (i) An Associate Professor of Religion with a Divinity Degree and a Ph.D. from Yale University, with 8 years teaching experience with the College; (j) An Associate Professor of Latin and Russian, with degrees from State University of Latvia, a Ph.D. from Columbia University, and additional graduate study at the University of Tubingen (Germany), and with 18 years teaching experience, 13 of which were at Lenoir Rhyne.

The Court finds and concludes that the Plaintiff has failed to establish by the evidence and by its greater weight that the Defendant College established or engaged in any practice, pattern, policy or custom of discriminating against faculty members on account of sex in employment, promotion, compensation, or retirement. The Plaintiff's evidence fails to disclose any specific instances of overt discrimination. She relies upon statistical data implying discrimination for her proof and contends that a prima facie case has been established and that she and her class should prevail. There are grave doubts that a showing by statistics indicating a lower average salary for female faculty members as compared to the average salary of male faculty members of a college is

sufficient to establish a prima facie case of sex discrimination. There are so many legitimate factors which must be considered in determining the salary of a college professor that it would be most difficult, if not impossible, to apply the same rule or standard applicable to an industrial assembly line. The Court is aware of the Supreme Court's holding in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973) and the decision of the Court of Appeals for the Fourth Circuit in *Barnett v. Grant Co.,* 518 F. 2d 543 (1975), where Judge Craven declared:

> "The district court erred in requiring proof of actual discrimination in addition to the statistical data implying discrimination. Statistics can in appropriate cases establish a prima facie case of discrimination, without the necessity of showing specific instances of overt discrimination." Long v. Sapp, 502 F. 2d 34 (5th Cir. 1974); U.S. vs. Chesapeake & O. Ry. 471 F. 2d 582, 586, and n. 7 (4th Cir. 1972), cert. den. 411 U.S. 939.

The term "appropriate case" used by Judge Craven would indicate the rule would not apply to all types of cases. This Court is inclined to the opinion that a College faculty case is not an "appropriate case" to apply the rule.

But, assuming *arguendo,* that the Plaintiff's evidence establishes a prima facie case and shifts the burden of proof, the Court finds and concludes that the Defendants have met this burden and have shown by strong, clear and convincing evidence that they have not violated the statute and have not discriminated against the Plaintiff and her class on the basis of sex.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. 2000e-2 makes it an unlawful employment practice for an employer —

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The Act further provides:

"(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, *** ."

The Plaintiff's contentions and evidence must be examined in light of the statute. She contends that the College violated the Act by discriminating against female faculty members in: (a) salaries and benefits; (b) equal pay was denied for equal work, and (c) the College followed a practice, pattern, or custom or established a policy of discrimination based on sex in hiring, promoting, granting of tenure, and job assignments, and other terms and conditions of employment.

The only evidence of discrimination in *hiring* is contained in the statistics which show the ratio of female and male faculty members to average for the past eight years about 68 per cent male and 32 per cent female. There is not a scintilla of evidence that the College failed or refused to hire any female, or that its procurement policy is directed toward males and against females, or that it has any hiring practice, custom, or policy which discriminates against women. On the other hand, the College offered evidence to show that it has no policy or uses any practice, pattern, or custom which discriminates against females. This evidence is contained in the oral testimony of the President of the College, the Chairman of the Board of Trustees, the Academic Dean of the College, and faculty members. The statistical data offered by the Defendants shows that the College has a greater percentage of female teachers than the national average in Colleges and Universities — the ratio being 68% male to 32% female, while the national average is 75% male to 25% female.

There is no evidence of discrimination in connection with the granting of tenure, or job and committee assignments. The evidence shows that the Plaintiff was granted tenure in accordance with the College policy and practice and that she was assigned to head a committee. In fact, the evidence shows that most female faculty members were given committee assignments and that a reasonable number of them were given responsibilities as Division and Department heads.

The promotion policy adopted by the College in 1969 does not within itself discriminate against female faculty members and the evidence does not show that it has been used in such a manner. The policy requiring a doctorate degree for a faculty member of a college to advance beyond the rank of

Assistant Professor is not prohibited by the statute. This is not the type of testing condemned by the Supreme Court in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). The Ph.D. degree is a credential which presumably is evidence of certain skills and knowledge from which one might predict job performance and is an educational credential which is almost universally required for higher ranks in most colleges. Indeed, accrediting agencies have used this as a standard for evaluation of academic institutions. These agencies are constantly urging colleges to upgrade their requirements for faculty members.

There is no evidence that prior to the adoption of the promotion policy in 1969 that women were discriminated against, nor does this policy violate Title VII by carrying the effects of past discrimination to the present. The evidence reveals that only three (3) individuals hold the rank of Professor on the effective date of Title VII, as to colleges, who did not have a Ph.D. degree. Of these individuals, one was in the School of Business, and one in the Math Department, areas where Ph.D. degrees are relatively scarce and hard to find — either male or female. The other individual had been employed by the College in the Music Department as a full Professor for 37 years before the effective date of the Act, as to colleges. The evidence also shows that a female faculty member in the Music Department was an Associate Professor without a Ph.D. degree and that she had obtained this status prior to the adoption of the policy. She was not required to give up her rank when the policy was adopted. The evidence also shows that there was a significant number of female professors in positions in the Department and Division who participated in the administration of the promotion policy to prevent discrimination based on sex.

The Plaintiff contends that the Defendant College violated Title VII and the Equal Pay Act by paying her and

other female faculty members lower salaries for similar work, because of their sex.

The Plaintiff has the initial burden of proving disparity in salaries with respect to faculty members who held jobs, the performance of which required equal skill, effort and responsibility and which were performed under similar working conditions. Only after Plaintiff's facts established a prima facie claim, would the burden shift to the College to demonstrate that the discriminatory differential, if established, was based on factors other than sex. See *Corning Glass Works v. Brennan*, 417 U.S. 118 (1974).

The College denies any salary disparity based on sex and contends that if a disparity exists, the differential was justified under the merit system exceptions of the Equal Pay Act and Title VII.

Applying the law as set forth in *Corning, supra*, the Plaintiff has the initial burden of not only proving that a disparity in salary existed between male and female teachers but that such disparity existed in such positions requiring equal work, equal skill, effort and responsibility, and which are performed under similar working conditions. *Hodgson v. Behrens Drug Co.* 475 F.2d 1041 (5th Cir. 1973).

The Plaintiff's evidence on this issue consisted entirely of the charts prepared from the salary information furnished by the College for the years 1966-67 through 1973-74. She made no attempt to show that the work performed by males and females was equal, or that the jobs were substantially equal or the same. She made no comparison of salaries discipline by discipline or department by department.

Assuming *arguendo*, that the Plaintiff established a prima facie case, the College went forward with the evidence

and showed the wide variety of teaching positions, the wide variety of requirements in skill in the positions and established a wide divergence of qualifications for the various faculty members. It established a salary schedule based on merit. In addition, the College offered evidence to explain each and every instance of disparity in salary between male and female. These discrepancies were based upon legitimate, reasonable, and nondiscriminatory factors. See *McDonnell-Douglas v. Green, supra.*

The standards set by Colleges and Universities as to qualifications for employment and promotion and salaries and benefits of faculty members are matters of professional judgment and a court should be slow to substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field. How can a court evaluate the relative merit as to salary of a doctorate degree in Physics as compared to a doctorate degree in Divinity? As stated by the court in *Green v. Board of Regents of Texas Tech University,* 335 F. Supp. 249 (N. D. Texas 1971, affirmed 474 F. 2d 594, 5th Cir. 1973):

> (1) Texas Tech University has established definite criteria for evaluating a person's eligibility for promotion in teaching rank. The criteria for promotion to full professor are especially exacting, as that is the highest faculty status which can be awarded by a university. The Court finds that these criteria are reasonable, that they bear a rational relationship to the duties of a full professor, and that they were reasonably applied in this case. They call for careful evaluation of (a) teaching ability, (b) publications and scholarly activity, and (c) service to the community and to the University. *It is undisputed that such evaluations are necessarily judgmental, and the Court will not substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.* (Emphasis added).

See *Faro v. New York University,* 502 F. 2d 1229 (2nd Cir. 1974).

While the actions of the officials of Lenoir Rhyne College in determining salaries and benefits and other conditions of employment of faculty members are far from perfect, the Court finds that based upon all of the circumstances of the operation of this College as shown by the evidence, such actions are reasonable and bear a rational relationship to the responsibility of obtaining and retaining a competent teaching faculty. The Court further finds that the imperfections and discrepancies existing are not based upon sex.

The Court finds and concludes that the Plaintiff's individual claims of sex discrimination in promotion, job assignment, salary, benefits and termination are without merit. The evidence relied upon for these claims is the same except as to the Plaintiff's termination. As shown in the findings of fact, the evidence does not support her contention that she was terminated because of her sex.

At the close of all the evidence the Court was of the opinion that the evidence was insufficient to show that the individual Defendants, Dr. Raymond M. Bost and Wallace J. Jorgenson, had denied the Plaintiff and her class any rights and, by consent of the parties, the action was dismissed as to each of them. No other was entered, but one will be filed with this Memorandum of Decision.

The Court finds and concludes that the evidence does not support a finding that the College has adopted or pursued, or is pursuing, a policy, practice, pattern, or custom of discrimination on the basis of sex in the payment of salaries and

benefits, in the hiring and promotion of its faculty members, or in the granting of tenure and job assignments, or in the retention, termination or retirement, or in other conditions of employment of such faculty members. The jury failed to properly consider and weight the long, tedious, and sometimes uninteresting evidence offered by the College in explanation of the various instances of disparity in salary schedules, and the Court cannot follow the advisory findings on these issues.

The contract issues were submitted to the jury as a matter of right and that part of the verdict will not be disturbed.

There has been no showing which would entitle the Plaintiff to relief under the provisions of the Fourteenth Amendment.

The Plaintiff and her class are not entitled to relief from the College under the Civil Rights Act of 1964, as amended, 42 U.S.C.A. 2000e, et seq., the Fourteenth Amendment, 28 U.S.C.A. 2201 and 2202, or the Equal Pay Act of 1963, 29 U.S.C.A. 206, et seq., and the action will be dismissed. Based upon the jury verdict and the evidence, the Plaintiff is not entitled to relief under her contract action as set forth in Count Two of her Complaint and that action will likewise be dismissed. An Order dismissing the actions will be entered simultaneously with this Memorandum of Decision.

This the 2nd day of January, 1976.

/s/ WOODROW W. JONES

Chief Judge

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

STATESVILLE DIVISION

DR. ANNIE LAURIE KEYES,
Plaintiff.

vs.

LENOIR RHYNE COLLEGE, ET AL.,
Defendants.

Civil Action
No. ST-C-74-10

JUDGMENT

THIS MATTER was tried before the court and a jury, and based upon the jury verdict and the findings and conclusions of the Court as set forth in a Memorandum of Decision filed simultaneously herewith,

IT IS ORDERED, ADJUDGED and DECREED that this action be, and the same is hereby dismissed.

This the 2nd day of January, 1976.

/s/ WOODROW W. JONES
Chief Judge

APPENDIX C

ANNIE LAURIE KEYES,

versus

LENOIR RHYNE COLLEGE, a non-profit corporation; WALLACE J. JORGENSON, Chairman of the Board of Trustees of Lenoir Rhyne College; RAYMOND M. BOST, President of Lenoir Rhyne College,

No. 76-1134.

United States Court of Appeals, Fourth Circuit

Argued Oct. 6, 1976.

Decided March 31, 1977.

Appeal from the United States District court for the Western District of North Carolina, at Statesville, Woodrow Wilson Jones, Chief Judge.

Before HAYNSWORTH, Chief Judge, CRAVEN, Circuit Judge, and FIELD, Senior Circuit Judge.

J. Levonne Chambers, Charlotte, N. C. (Chambers, Stein, Ferguson & Becton, Charlotte, N. C., on brief), for appellant.

W. Gene Sigmon, Newton, N. C. (Jesse C. Sigmon, Jr., Sigmon & Sigmon, Newton, N. C., George M. Chapman, Charlotte, N. C., on brief), for appellees.

FIELD, Senior Circuit Judge:

The plaintiff, Dr. Annie Laurie Keyes, filed this action against Lenoir Rhyne College, its President and the Chairman of its Board of Trustees, seeking injunctive, declaratory and pecuniary relief for herself and female faculty members of the College for alleged discrimination in employment

opportunities because of their sex and age.[1] The action was based upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq.*, and the Fourteenth Amendment of the Federal Constitution.[2] Under the theory of pendent jurisdiction, Dr. Keyes also sought damages for breach of contract under the law of North Carolina. Following a lengthy trial the district judge filed a memorandum decision in which he made findings of fact based upon a detailed and thorough analysis of the evidence presented, and concluded that neither the plaintiff nor her class was entitled to relief. The plaintiff has appealed.

Dr. Keyes had previously been employed by the College from 1945 to 1949 as an associate professor, but had resigned to accept employment with the United States Department of Health, Education and Welfare. She was reemployed by the College in 1968 at which time she was sixty years of age. In 1969 the Board of Trustees of the College reduced the retirement age of all personnel, including faculty members, from sixty-eight to sixty-five and gave written notice of such change to the faculty and other employees. The Board elected to continue its policy of authorizing extension of service beyond the retirement age on an individual basis when approved by a special vote of the Board. Dr. Keyes reached the age of sixty-five during the 1972-73 school year and on March 31, 1972, was notified that her employment

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[1]The district court determined that the case should be maintained as a class action on behalf "of past, present and future female faculty who have been, who are presently, and who in the future may be adversely affected by any discriminatory employment practices based upon sex."

[2]Shortly prior to trial the district court granted the plaintiffs motion to amend the complaint to set forth a claim under the Equal Pay Act of 1963, 29 U.S.C. § 206(d).

would be terminated at the conclusion of the 1972-73 academic year.

The plaintiff's request that she be permitted to teach beyond her retirement age was denied by the administration and she appealed that decision to the Board of Trustees. Following a full hearing the Board affirmed the decision of the administration and denied Dr. Keyes' request for an extension. After being notified of the Board's decision, the plaintiff filed charges with the Department of Labor as well as the Equal Employment Opportunity Commission. No action was taken by either of these agencies, and after receipt of her ninety day letter from the EEOC the plaintiff instituted this action.

Lenoir Rhyne College is a private institution with an average student enrollment of 1300 and a relatively small administrative staff and faculty, the total faculty numbering about ninety people. The evidence indicated that between the years 1966 and 1974 the percentage of women on the faculty at Lenoir Rhyne varied from twenty-eight percent to thirty-four percent. This was considerably higher than the national average for colleges and universities which during the 1972-73 academic year was some twenty percent. While the evidence revealed that the average male faculty salary was higher than that of females, there was no showing of any salary differential for teaching positions which were substantially equal, and in presenting her statistical evidence, the plaintiff made no comparison of salaries discipline by discipline or department by department. The district court found that the plaintiff had failed to establish a prima facia case by her statistical evidence and concluded that, in any event, the College had presented clear and convincing evidence to explain any disparity in salary between males and females, demonstrating that such differ-

entials were based upon legitimate, reasonable and non-discriminatory factors.[3] Our review of the record persuades us that these findings of the district court were not clearly erroneous.

During the course of discovery, the plaintiff requested the production of certain records and documents, including copies of the plaintiff's personnel records, the personnel records of current faculty members, together with reports, records and correspondence dealing with the Government's investigation of sex discrimination by the College. The court ordered the disclosure of certain information with respect to all faculty members for the period from September 1, 1966, through the 1973-74 academic year. This information included the name or an identifying number of each faculty member during that period with pertinent data relative to sex, tenure, status, annual salary and department position.[4]

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[3]On the retirement issue the record showed that since 1966 eleven faculty members had been permitted to teach beyond the stated retirement age. During that period three females were granted such an extension and only one, Dr. Keyes, was denied such a privilege. During that same period eight male faculty members were granted such an extension and three were denied. We agree with the district court that these statistics do not suggest that sex discrimination played any part in the grant or denial of such extensions. Dr. Keyes presented no other evidence that the decision of the Board in denying her an extension was based on her sex.

[4]Specifically, the College furnished the following information:

1. The name or identifying number of every faculty member.
2. The sex of each faculty member.
3. The degrees earned and dates of each degree of every faculty member.
4. The date of employment at Lenoir Rhyne College.
5. The present rank of the faculty members.

Pursuant to the court's order the College also produced copies of all correspondence, memoranda and reports which had been forwarded to the Department of Labor, the Department of Justice, the Department of Health, Education and Welfare, and the Equal Employment Opportunity Commission. The court, however, declined to order the production of the confidential evaluations of each faculty member which had been made annually by the Division and Department Chairmen commencing with the 1970-71 school year. The plaintiff challenges this action of the court, contending that it precluded her from discovering evidence which would show that the defendants' explanations for certain male-female variances in salaries and promotions were pretextual.

Under Rule 26 (c) of the Federal Rules of Civil Procedure, the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense***," and the scope of such an order lies within the discretion of the trial judge and will be reversed only if there is an abuse of that discretion. *Galella v. Onassis,* 487 F.2d 986 (2 Cir. 1973); *General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F.2d 1204 (8 Cir. 1973); 8 Wright & Miller, Federal Practice and Proce-

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6. The tenure status of the faculty members.
7. The dates of promotion in rank of faculty members including the date tenure was granted.
8. The annual earning or salary of every faculty member.
9. The annual committee appointments of every faculty member.
10. The annual department position held by every faculty member.
11. All special recognitions and honors of every faculty member with dates.

dure, § 2036 (1970). In the present case the College asked that the confidentiality of the faculty evaluation records be protected, urging that the assurance of confidentiality enabled the College to receive honest and candid appraisals of the abilities of the faculty members by their peers. It was, of course, necessary for the court to balance this interest of the College against the need of the plaintiff for such material,[5] and if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have granted the opportunity to use them to demonstrate that the explanation was pretextual. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Here, however, the College did not resort to the evaluations for that purpose,[6] and in the absence of some further showing on the part of the plaintiff, the district court's decision to protect these records from disclosure was not an abuse of its discretion.

Discerning no error of fact or law, we affirm the judgment of the district court.

AFFIRMED.

CRAVEN, Circuit Judge, dissenting:

I think the statistical evidence establishes a pattern, prac-

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[5]*General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F.2d 1204, 1212 (8 Cir. 1973).

[6]Such evaluations are necessarily judgmental, and had the College seen fit to rely upon them we would be faced with the delicate question of whether the court should "substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field." *Green v. Board of Regents of Texas Tech University,* 335 F.Supp. 249, 250 (N.D. Tex. 1971), *aff'd* 474 F.2d 594 (5 Cir. 1973). *See Faro v. New York University,* 502 F.2d 1229 (2 Cir. 1974).

tice, or custom of discrimination based on sex against female faculty members with respect to compensation, and that the defendants are shown by such evidence to have denied equal pay to female faculty members for the same or similar work performed by male faculty members. The advisory jury so found, and I think the district judge abused his discretion in disregarding the advice of the jury.

In the 1972-73 school year, Professor Keyes (the plaintiff) was the lowest paid full professor on the faculty, receiving a salary of $12,134, yet her objective point total (which took into consideration degree, rank, experience and merit) ranked her tenth out of 16. The second highest paid professor was a male whose point score was lower than Mrs. Keyes. These comparisons, although disparate on their face, are admittedly not of compelling significance because they include all of the College's professors and are not broken down departmentally.

The record does, however, contain a comparison of salaries within the departments — Plaintiff's Exhibit 13a, "Confidential Salary Information." Within the Education Department of which Mrs. Keyes was a member, it appears that Mrs. Keyes, who was a full professor, received in 1968-69 a salary of $9,450, whereas male professor Schwarzbek received a salary of $10,206 although he was an associate professor and nontenured and she was a full professor and tenured. The documentary evidence for the Education Department also shows that Mr. Wiener was paid $12,015 when Mrs. Keyes received $11,667, although Mr. Wiener was a nontenured assistant professor and Mrs. Keyes was a tenured full professor.

In the Mathematics Department it appears that Mrs. Hawn received a salary of $9,129 and Mr. Smith a salary of

$10,438, although they were of the same rank and Mr. Smith was nontenured and Mrs. Hawn was tenured.

In the English Department Mrs. Swink was paid $6,606 and Mr. Mahan was paid $8,865, although both were of the same rank and nontenured. Also in the English Department Mr. Whitesides was paid $7,695 and Mrs. Jeffers, $5,895, although she was tenured and he was not and they were of the same rank.

Despite this statistical showing, my brothers conclude, as did the district judge, that the College "presented clear and convincing evidence to explain any disparity in salary between males and females, demonstrating that such differentials were based upon legitimate, reasonable and nondiscriminatory factors." But they point to no such factors (except with respect to the question of whether there was discrimination in being permitted to teach beyond the stated retirement age). Nor can I find in the district court opinion precisely what factors are different that objectively account for pay disparity within departments.

I agree that even within the same department there may be legitimate salary variances and that college administrators may properly take into account the differences of quality in education and in prior teaching experience and other qualitative factors. But the College made no showing below to account for the disparity of pay in the examples I have set forth hereinabove. The record shows, for example, that when asked to explain the difference between the salaries of a man and a woman within the same department, Dr. Bost, the College's president, responded that he could not say precisely what accounted for the woman's lower salary. (App. at 663). He was the only witness who attempted to explain the disparities shown by Exhibit 13a.

It is clear that a plaintiff in a case such as this may establish a prima facie case by statistical evidence. *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975). It is also clear to me that the plaintiff here has done so and that the College has failed to satisfactorily explain the disparity in salaries within departments as between males and females.

I would reverse with an instruction to accept the verdict of the advisory jury.

APPENDIX D

IN THE

Supreme Court of the United States

FOR THE FOURTH CIRCUIT

NO. 76-1134

DR. ANNIE LAURIE KEYES,

Appellant,

v.

LENOIR RHYNE COLLEGE, a non profit Corporation; WALLACE J. JORGENSON, Chairman of the Board of Trustees of Lenoir Rhyne College, and DR. RAYMOND M. BOST, President of Lenoir Rhyne College,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, Statesville Division, Woodrow W. Jones, District Judge

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PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

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PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

This appeal presents a major question of the standards of proof that will be required in equal employment Title VII[1] proceedings and the standard for review of district court fact findings and conclusions of law in such cases. The determination of these issues will bear substantially on the effective implementation of the congressional objectives in enacting Title VII.

[1]42 U.S.C. Sections 2000e et seq.

Plaintiff brought this proceeding as a class action. She alleged that she and other female employees of Lenoir Rhyne College had been discriminated against in wages, promotions and other terms and conditions of employment because of their sex. The action was certified as a class action consisting of all past, present and future female faculty members of the College.

At trial, plaintiff presented statistical and other evidence which demonstrated that she and other women as a class had been adversely affected in wages, promotions and other terms of employment because of their sex, both within the same disciplines and departments as well as across the board.[2] The district court noted these discrepancies but felt that more evidence was required to establish discrimination in these cases than in "assembly line" cases. (See pages 164-165 of the Joint Appendix).

The majority of the panel of this Court apparently accepted the district court's position or the alternative ground advanced by the district court that "the College had presented clear and convincing evidence to explain any disparities" in treatment of male and female faculty members.

The panel majority also found no error in the district court's denial to plaintiffs of faculty member evaluations because "the College did not resort to the evaluations" to explain the disparities.

1. The plaintiff respectfully submits that the panel decision is at odds with the standard of proof and review required in Title VII proceedings by the Supreme Court. *McDonnell*

[2]See pp. 544, 704-720, 928-929, 1262-1269, 1282-1287 of the Joint Appendix and dissenting Opinion of Judge Craven to the panel's decision in this matter on March 31, 1977.

Douglas Corp. v. Green, 411 U.S. 792 (1973); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), and by this Court. *Hairston v. McLean Trucking Company,* 520 F. 2d 226 (4th Cir. 1975); but *cf Roman v. ESB, Inc.,* __ F. 2d __, 13 EPD Para. 11,285 (4th Cir. 1976). The plaintiff submits that the Court should give further consideration to the standard of proof sanctioned by the panel decision in this case or should, at least, await further guidance by the Supreme Court's decision in *Rodriquez v. East Texas Motor Freight,* 505 F. 2d 40 (5th Cir. 1974), *cert. granted,* 48 L. Ed. 2d 814 (1976); *United States v. T.I.M.E.-D.C., Inc.,* 517 F. 2d 299 (5th Cir. 1975), *cert. granted,* 48 L. Ed. 2d 814 (1976) and *United States v. Hazelwood School District,* 534 F. 2d 805 (8th Cir. 1976), *cert. granted,* 45 U.S.L.W. 3454 (1977). These three cases raise similar issues as the issue presented in the instant case.

2. The panel majority, the plaintiff submits, also erred in holding that the College did not rely on faculty evaluations in explaining salary and promotion disparities. Defendants' explanation appears on pages 471-547, 649-676 and 868-949 of the Joint Appendix. The plaintiff respectfully calls the Court's attention to these pages, including the following:

Page 678

"Q. Now, am I correct, Dr. Bost, that those (faculty) evaluations are used by the administration in determining merit increases for faculty members?

A. They would influence merit increases, yes."

Page 679

"Q. . . . [b]ut the decisions whether to promote are influenced by the evaluations that come to Dean Unglaube?

A. Yes."

Page 680

"Q. I believe that the granting of tenure was also influenced by these evaluations?

A. Yes, it would be influenced."

See also, pages 882-883.

Because of the importance of the issues presented in this appeal, and the adverse affect that the decision of the panel and the district court may have on the effective implementation of Title VII, the plaintiff respectfully prays that the Court grant her a rehearing in this matter and respectfully suggests that the matter be reheard en banc.

This 13th day of April, 1977.

Respectfully submitted,

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Attorney for Appellant-Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served copies of the foregoing PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC upon counsel for the defendants by depositing copies of same in the United States mail, postage prepaid, addressed to:

Mr. George M. Chapman
1014 Law Building
Charlotte, North Carolina 28202

and

Mr. Jesse C. Sigmon, Jr.
Mr. Genę Sigmon
Post Office Box 88
Newton, North Carolina 28658

This 13th day of April, 1977.

J. LeVonne Chambers

Attorney for Appellant - Petitioner

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1134

ANNIE LAURIE KEYES, *Appellant,*

versus

LENOIR RHYNE COLLEGE, a non-profit corporation; WALLACE J. JORGENSON, Chairman of the Board of Trustees of Lenoir Rhyne College; RAYMOND M. BOST, President of Lenoir Rhyne College, *Appellees.*

Appeal from the United States District Court for the Western District of North Carolina, at Statesville.
Woodrow W. Jones, District Judge.

ORDER ON REHEARING

Upon consideration of the appellant's petition for rehearing and of the suggestion for rehearing in banc;

NOW THEREFORE, with the concurrence of Chief Judge Haynsworth and in the absence of a request for a poll of the entire court as provided by Appellate Rule 35(b),

It is ADJUDGED and ORDERED that the petition for rehearing is denied. Judge Craven had indicated that he desired to be recorded as voting to grant rehearing.

Senior United States Circuit Judge

Filed May 12, 1977

APPENDIX F

Joint Appendix, Page 883 and 884

A. You are saying Associate No. 15 with —

Q. Assistant No. 1.

A. Assistant No.1 is in the Education Department and has a total of eight years of experience, had served one year at Lenoir Rhyne at the time this analysis was conducted. This faculty member had been serving in administrative posts in public education, I believe, in the State of New Jersey, and in order to recruit that faculty member that was the salary that we negotiated.

Joint Appendix, Page 625

Q. Dr. Bost, according to the answers to interrogatories Professor William Schwarzbek was also retained for the 1972-73 school year, and according to the answer Professor Schwarzbek was in Education. Now, would you tell the jury why Professor Schwarzabek was retained and Dr. Keyes was not?

A. There are certain specialties within fields in which persons are quite scarce. Within the field of Education, while generally there are plenty of degree recipients available in the field, persons in the field of Psychology are less plentiful than some other areas.

Q. Did you try to find someone in the field of Psychology in Education?

A. I do not recall whether a specific search was instituted or not.

Q. How can you tell the jury that you didn't have anyone available to fill this position?

A. I did not tell the jury we did not have anyone available to fill his position, sir.

Q. Well, do you want to tell the jury if there is any other reason why you did keep Professor Schwarzbek and not Dr. Keyes?

A. Dr. Schwarzbek was performing effectively. He desired continuation. We did not have anyone immediately available to step into his place.

Joint Appendix, Page 973 and 974

Q. Now, Miss Hawn, have you been treated differently from male members of the faculty because of your being a female in the matter of assignment to job positions?

MR. CHAMBERS: Object.

THE COURT: Overruled.

A. No.

Q. In the matter of being hired at a lower rank or position than male faculty members?

MR. CHAMBERS: Object.

THE COURT: Overruled.

A. No.

Q. In the matter of opportunity for promotion, transfer or assignment to higher or better rank or position?

MR. CHAMBERS: Object.

THE COURT: Overruled.

A. No.

Q. In the matter of equal job benefits or opportunities, including fringe benefits?

MR. CHAMBERS: Object.

THE COURT: Overruled.

A. No.

Q. In the matter of salary?

MR. CHAMBERS: Object.

THE COURT: Overruled.

A. No.

Q. Miss Hawn, do you know of an instance in which any woman member of the faculty at Lenoir Rhyne College has been treated differently in any of these things I have just asked you about than men faculty members because of the woman's sex.

A. No.

Joint Appendix, Page 943

Q. How many years experience did Assistant Professor 9 have?

A. Thirteen.

Q. And his salary was what?

A. $10,961. (To The Court:) Your Honor, may I explain the answer to those last three?

THE COURT: You may.

A. All of those last three people named, males named, were at the A.B.D. level. They are being compared with a woman at the Masters level.

Q. Did any one of them get a Doctorate degree yet?

A. That was 6, 8 and 9, I believe. Is that right?

Q. Yes.

A. 6 and 8 have not completed it. 9 — I'm sorry. Assistant Professor No. 9, he is also at the A.B.D. level. 6, 8, and 9 have

not completed their degree.

Joint Appendix, Page 524 and 525

Q. Dr. Unglaube, in your salary range Dr. Chambers asked you why a math professor would be hired with a doctorate degree with no experience at a higher salary than with a doctorate degree with ten years of teaching experience would be hired at a higher salary than someone in the Education Department with fourteen years of experience. How many doctors did you have in the Math Department at Lenoir Rhyne?

A. None.

Q. Have you ever had a doctor at Lenoir Rhyne?

A. In Math?

Q. In Math?

A. Not to my knowledge.

Q. Why had you never a doctor in math?

A. I have no idea.

Q. Is it hard to get them?

A. It is difficult to get them now, yes.

Q. Is it hard to get women with doctorate degrees in math?

A. It would be harder to employ women with doctorates in math than men with doctorates in math with degrees conferred, yes.